IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

FRIDAY, THE 27TH OCTOBER 2006 / 5TH KARTHIKA 1928

El.Pet..No. 1 of 2006

PETITIONER:

ANIL, S/O. ANTHONY,
AGED 33 YEARS, AKKARA PATTIAKKAL HOUSE,
PURANATTUKARA VILLAGE, THRISSUR TALUK,
THRISSUR DISTRICT.

BY ADV. SRI.K.RAMAKUMAR
SRI.T.RAMPRASAD UNNI
SMT.SARITHA DAVID CHUNKATH
SRI.A.SAMEER
SRI.R.JAYACHANDRAN
SRI.V.K.SREENATH
SRI.VINOD.V (EDAPPUNATHIL)

RESPONDENT:

SRI.BABU M.PALISSERY,
S/O. CHINNAPPAN NAIR, AGED 47 YEARS,
MULLATH HOUSE, KADAVALLUR VILLAGE, THALAPPALLY TALUK
P.O. KORATTIKKARA, THRISSUR DISTRICT.

BY ADV. SRI.G.JANARDHANA KURUP (SR.)
SRI.JOHN K.GEORGE
SRI.JAI GEORGE
SRI.HRITHWIK
SRI.K.S.ARUN KUMAR
SRI.AKBAR.K.A
SRI.E.C.BINEESH

THIS ELECTION PETITION HAVING BEEN FINALLY HEARD ON 26/09/2006, THE COURT ON 27/10/2006 DELIVERED THE FOLLOWING:

THOTTATHIL B. RADHAKRISHNAN, J.

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E.P.No.1 OF 2006

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Dated this the 27th day of October, 2006.

O R D E R

1. Petitioner, an elector, challenges the election of the respondent to the Kerala Legislative Assembly from No. 56 - Kunnamkulam Assembly constituency, in the election held on 29.04.2006.

2. Going by the pleadings in the election petition, the respondent, Babu M. Palissery, son of Chinnappan Nair, Mullath House, is included at Serial No. 802 in the electoral roll of No. 55 - Vadakkancherry assembly constituency of the Kerala Legislative Assembly.

3. According to the petitioner, the above inclusion of the respondent in the electoral roll is illegal in terms of the Representation of the People Act, 1950, hereinafter, the "1950 Act", for short; the Representation of the People Act, 1951, hereinafter, the "1951 Act", for short; the Registration of Electors Rules, 1960, hereinafter,

the "R E Rules", for short and the Constitution of India. It is also his case that there is no proper submission of the nomination paper, in as much as the affidavit in Form 26, in terms of Rule 4A of the Conduct of Election Rules, 1961, hereinafter, the "C E Rules", for short and the affidavit required in terms of Order No.3/ER/2993/JS-II dated 27.03.2003, of the Election Commission of India are sworn to by the respondent by describing himself in terms of his description as is presently available in the electoral roll and without disclosing his educational pursuits.

4. The election petition is captioned as filed under Clauses (a), (d) (i) and (d) (iv) of Sub-section (1) of Section 100 of the 1951 Act, as also Sections 80, 80A, 81, 83, 84 and 125A of that Act. Section 177 of the 1951 Act, relating to security for costs, is also mentioned.

5. The allegations against the respondent are as follows:

    a. He is actually Sankaranarayanan, son of P. Raman Nair and Mullathu Devaki Amma of Mullathu Paliserry House. With such name, he was included at Serial No. 533

in the electoral roll of No. 55 – Vadakkancherry Assembly constituency. His identity as such, is a matter of record, going by his school and college records. He was a member of the Vidyarthi Parishad, a student organization of the Rashtriya Swayam Sevak Sangh and though acquitted by the Court of Session, was instrumental in the death of Saidali, who was associated with the Students Federation of India. He applied to the Electoral Registration Officer, hereinafter, "ERO", for short, in Form 6 of the R E Rules, which is prescribed for making a claim for inclusion of name in the electoral roll, by changing his name, his father's name and the name of his residence. The ERO, under the tremendous influence and command exerted on him, through the revenue department, by the respondent and his brother M.Balaji, altered the caption of that application as Form 8A of the R E Rules, prescribed to apply for transposition of entry in the electoral roll and thereby made the changes in the entries. This was done in violation of the R E Rules. The resultant situation, according to the petitioner, is that the inclusion of the respondent in the electoral roll, at Serial No. 802, with the name, Babu M. Palissery is void and the said exercise has resulted in the deletion of the name Sankaranarayanan from the electoral

rolls, and that therefore, the respondent is not one included in any electoral roll in the State and therefore not qualified to be elected.

b. Owing to the fact that they were sworn to by the respondent by describing himself in terms of his description as is presently available in the electoral roll and without disclosing his educational pursuits, the affidavit in Form 26 and the affidavit in terms of the order of the Election Commission, following the directions of the Apex Court, are bad and therefore the acceptance of the nomination paper, accompanied by such affidavits, was improper.

c. The respondent suppressed the true facts as to his paternity, house name, educational pursuits, etc. to exclude him being identified by the workers of the Communist Party of India (Marxist), as the one involved in Saidali murder case, while he contested the present election as a candidate, sponsored by that political party. It is alleged that changes were made also regarding the name of the wife of the respondent. The respondent is a turncoat in politics and fraudulent practice was resorted to, as above, to hoodwink the voters and the workers of the Communist Party of India (Marxist), who have intense loyalty to that party, would

not have voted for the respondent, had they known that he was involved in the sessions case on account of the death of Saidali, one of their comrades.

6. The respondent, by way of **preliminary objections**, has contended that the election petition does not disclose a cause of action; matters relating to the violation of the R E Rules are not justiciable in these proceedings and that the pleadings do not contain material facts as regards any of the allegations, particularly, the alleged influence stated to have been exerted on the ERO.

7. Clauses (a), (d) (i) and (d) (iv) of Sub-section (1) of Section 100 of the 1951 Act read as follows:

"100. Grounds for declaring election to be void –

(1) Subject to the provisions of sub-section (2) if the High Court is of the opinion –

(a) that on the date of election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act or the Government of Union Territories Act, 1963 (20 of 1963); or

(b) that *********, or

(c) that *********, or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected –

(i) by the improper acceptance of any nomination, or

(ii) by *********, or

(iii) by *********, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,

the High Court shall declare the election of the returned candidate to be void."

In re Clause (a) of Sub-section (1) of Section 100:

8. In terms of Clause (a) of Sub-section (1) of Section 100, the election of the respondent, the returned candidate, is to be declared void, if he, on the date of election, was not qualified, or was disqualified to be chosen to fill the seat under the Constitution or the 1951 Act.

9. No case of disqualification or absence of qualification, either under Article 173 or any other among the provisions of the Constitution is alleged. No disqualification in terms of Chapter III or Section 11A of the 1951 Act is specifically alleged against the respondent.

10. It has to be considered as to **whether there is a triable plea that the respondent was not qualified for membership in terms of section 5**, the relevant in that regard from among the provisions **in Chapter II of the 1951 Act**, relating to Qualifications For Membership of State Legislatures.

11. Section 5(c) in Chapter II of the 1951 Act is relevant. It reads as follows:

"5. Qualification for membership of a Legislative Assembly –

A person shall not be qualified to be chosen to fill a seat in the Legislative Assembly of a State unless –

(a) in the case of a seat reserved……..

(b) in the case of a seat reserved……..

(c) in the case of any other seat, **he is an elector** for any Assembly constituency in that State:

Provided that……."

(emphasis supplied)

12. "**Elector**" is defined in the 1951 Act as follows:

"2. Interpretation -(1) In this Act, unless the context otherwise requires,-

(e) **"elector"** in relation to a constituency means a person whose **name is entered in the electoral roll** of that constituency for the time being in force and who is **not subject to any of the disqualifications mentioned in**

section 16 of the Representation of the People **Act, 1950** (43 of 1950)."

13. Electoral roll in relation to a constituency is the electoral roll under the 1950 Act, the preparation of which is provided for by section 15 of that Act. The name of the respondent, the returned candidate is at Serial No. 802 in the electoral roll of No. 55 – Vadakkancherry Assembly constituency of the Kerala Legislative Assembly.

14. The petitioner has no case that the alleged transposition, or the deletion and inclusion, as contended by him, was done after the last date for making nominations for the election in question, to fall within the vice of Section 23(3) of the 1950 Act. Nor is it his case that the respondent is registered in the electoral roll for any constituency, more than once, in violation of Section 18 of the 1950 Act.

15. Section 36 of the 1951 Act, which provides for scrutiny of nomination, authorizes rejection of any nomination, only on the grounds enumerated under Sub-section (2) thereof. Sub-section (7) of Section 36 of the 1951 Act provides that for the purpose of Section 36, that is, for the scrutiny of nomination, a certified copy of an entry in the

electoral roll, for the time being in force, of a constituency, shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency, unless it is proved that he is subject to a disqualification mentioned in Section 16 of the 1950 Act.

16. The respondent is not alleged to be subject to any of the disqualifications mentioned in Section 16 of the 1950 Act, which are enumerated in Sub-section (1) thereof, on counts of citizenship, unsoundness of mind as declared by the competent court and disqualification from voting under the provisions of any law relating to corrupt practices and other offences in connection with elections.

17. For the aforesaid reasons, no cause of action is disclosed by the pleadings in this election petition, to proceed with the trial and declare the election of the respondent void in terms of Clause (a) of Sub-section (1) of Section 100 of the 1951 Act, on the ground that he, on the date of election, was not qualified, or was disqualified to be chosen to fill the seat under the Constitution or the 1951 Act.

In re Sub-clause (i) of Clause (d) of Sub-section (1) of Section 100:

18. Under Clause (d)(i) of Sub-section (1) of Section 100, the election of the respondent is to be declared void, if the result of the election, in so far as it concerns the respondent, has been materially affected by the improper acceptance of any nomination, in this case, his nomination.

19. The petitioner's plea in this regard is footed on the allegations regarding the inclusion of the name of the respondent, the returned candidate at Serial No. 802 in the electoral roll of No. 55 – Vadakkancherry Assembly constituency of the Kerala Legislative Assembly. As already noticed, Sub-section (7) of Section 36 of the 1951 Act provides that for the purpose of Section 36, that is, for the scrutiny of nomination, a certified copy of an entry in the electoral roll, for the time being in force, of a constituency, shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency, unless it is proved that he is subject to a disqualification mentioned in Section 16 of the 1950 Act.

20. In ***B.M. Ramaswamy v. B.M. Krishnamurthy, (1963) 3 SCR 479,*** it was held by the Honourable Supreme Court that there is no provision in the 1951 Act, which enables the High Court to set aside the election on the ground that though the name of a candidate is in the list, it had been included therein illegally.

21. It was noticed in ***Kabul Singh v. Kundan Singh, (1969) 2 SCC 452,*** that in ***B.M. Ramaswamy (supra)***, the Apex Court had come to the conclusion that the finality of the electoral roll cannot be challenged in a proceeding challenging the validity of the election. It was held that in view of Section 30 of the 1950 Act, civil courts have no jurisdiction to entertain or adjudicate upon any question whether any person is or is not entitled to register himself in the electoral roll in a constituency or to question the illegality of the action taken by or under the authority of the ERO or any decision given by any authority appointed under that Act for the revision of any such roll. It was noticed that Part III of the 1950 Act deals with the preparation of rolls in a constituency and that the provisions contained therein prescribe the qualifications for being

registered as a voter (Section 19), disqualifications which disentitle a person from being registered as a voter (Section 16), revision of the rolls (Section 21), correction of entries in the electoral rolls (Section 22), inclusion of the names in the electoral rolls (Section 23) and appeals against orders passed by the concerned authorities under Sections 22 and 23 (Section 24). It was held that sections 14 to 24 of the 1950 Act are integrated provisions and that they form a complete code by themselves in the matter of preparation and maintenance of electoral rolls. It was laid down therein that it is clear from those provisions that the entries found in the electoral roll are final and they are not open to challenge either before a civil court or before a tribunal, which considers the validity of any election.

22. Noticing the law laid in ***Kabul Singh (supra)*** and that Section 30 of the 1950 Act makes it clear that civil courts have no power to adjudicate questions as to the legality of the entries found in the electoral roll, it was laid down by the Apex Court in ***Hari Prasad Mulshanker Trivedi v. V.B. Raju, (1974) 3 SCC 415***, that there is an implied ouster of the jurisdiction of the Court trying an election petition to go into the

question and that the said inference is strengthened by the fact that under Section 100(1)(*d*)(*iv*) of the 1951 Act the result of the election must have been materially affected by non-compliance with the provisions of the Constitution or of that Act or of the rules, orders made under that Act in order that High Court may declare an election to be void and the non-compliance with the provisions of Section 19 of the 1950 Act cannot furnish a ground for declaring an election void under that clause.

23. In ***S.K.Choudhary v. B.Panjiar (AIR 1973 SC 717),*** it was held by the Apex Court that in a petition to the High Court to set aside an election, it is not open to the High Court to go into the question whether names of certain persons entered in the electoral roll were entered illegally. The Apex Court further held that even assuming that the inclusion of names of certain persons in the electoral roll was illegal, it was not open to the High Court, when trying an election petition, to go behind the electoral roll and enquire into the question whether those persons were validly appointed and the inclusion of their names in the electoral roll was legal. In doing so, their Lordships after noticing ***Pampakavi Rayappa's case***

(AIR 1971 SC 1348) to the effect that no civil court shall have jurisdiction to entertain or adjudicate upon any question whether any person is or is not entitled for registration in an Electoral Roll for a constituency, distinguished the decision in ***Chief Commissioner, Ajmer v. Radhay Shyam Dani (AIR 1957 SC 304***), which was one on a writ petition on the validity of the notification and the electoral roll and was not on an election petition.

24. In ***Durga Shankar Mehta v. Raghuraj Singh, (1955) 1 SCR 267***, it was held that if the want of qualification of a candidate does not appear on the face of the nomination paper or of the electoral roll, but is a matter which could be established only by evidence, an enquiry at the stage of scrutiny of the nomination papers is required under the Act only if there is any objection to the nomination, but when the candidate appears to be properly qualified on the face of the electoral roll and the nomination paper and no objection is raised to the nomination, the Returning Officer has no other alternative but to accept the nomination. Law was so laid by the Apex Court after noticing the

effect of the conclusiveness given to the electoral rolls as per Sub-section (7) of Section 36 the 1951 Act. It was further held that when no objection was taken to the nomination before him at the time of scrutiny, the Returning Officer was bound to take the entry in the electoral roll as conclusive and it cannot be said that there was an improper acceptance of nomination. It was laid down that it would have been an improper acceptance, if the want of qualification was apparent on the electoral roll itself or on the face of the nomination paper and the Returning Officer overlooked that defect or if any objection was raised and enquiry made as to the absence of qualification in the candidate and the Returning Officer came to a wrong conclusion on the materials placed before him. When neither of these things happened, the acceptance of the nomination by the Returning Officer must be deemed to be a proper acceptance.

25. Sub-section (2) of Section 36 of the 1951 Act enumerates the grounds for rejection of nomination. Therefore, the improper acceptance of nomination, for the purpose of Section 100(1)(d)(i), has to be understood in the light of the grounds on which a nomination can be rejected

under Sub-section (2) of Section 36 of the 1951 Act. This is how Section 100(1)(d)(i) has to be considered. Otherwise, much could be imported into Section 100(1)(d)(i) by mere speculation.

26. In view of the above, the pleadings in this election petition do not disclose any cause of action, to proceed with the trial and declare the election of the respondent void in terms of clause (d) (i) of sub-section (1) of section 100 of the 1951 Act, on the ground that he, on the date of election, was not qualified, or was disqualified to be chosen to fill the seat under the Constitution or the 1951 Act.

In re Sub-clause (iv) of Clause (d) of Sub-section (1) of Section 100:

27. As per Clause (d)(iv) of Sub-section (1) of Section 100, the election of the respondent is to be declared void, if the result of the election, in so far as it concerns the respondent, has been materially affected by any non-compliance with the provisions of the Constitution or of the 1951 Act or of any rules or orders made under the 1951 Act.

28. The inclusion of the name of the respondent, the returned candidate at Serial No.802 in the electoral roll of No. 55 – Vadakkancherry Assembly constituency of the Kerala Legislative Assembly is an action taken under the R E Rules, which are rules issued by the Central Government under Section 28 of the 1950 Act and not under the 1951 Act. The non-compliance with the provisions of the 1950 Act and/or the rules or orders made thereunder is not covered by Sub-clause (iv) of Clause (d) of Sub-section (1) of Section 100.

29. The conclusiveness of the electoral roll, to the extent noticed above, while dealing with Clause (d)(i) of Sub-section (1) of Section 100 and the embargo on the Court trying the election petition to go into the correctness or otherwise of the electoral roll, as laid down by the Apex Court, on the interpretation of the relevant statutory provisions, exclude any such ground being imported and passed off as one referable to the 1951 Act.

30. It is worthwhile to notice that before Section 100(1)(d)(iv), came to be in its present form, following the amendment of the 1951 Act in 1956, the election of the returned candidate could have been declared void, if the result of the election

has been materially affected by any non-compliance with the provisions of the Constitution or of the 1951 Act or of any rules or orders made under the 1951 Act or of any other Act or rules relating to the election. The amendment in 1956 clearly expresses the legislative intent that the vitiating elements shall not extend beyond the provisions of the Constitution, the 1951 Act and the rules and orders made under the 1951 Act.

31. There is no plea as to the violation of any provisions of the Constitution.

32. So much so, there is no triable allegation as regards the non-compliance with the provisions of the 1951 Act or of any rules or orders made under that Act.

In re the affidavit in Form 26 and the affidavit required in terms of the order of the Election Commission:

33. The allegation is that the affidavit in Form 26, in terms of Rule 4A of the C E Rules and the affidavit required in terms of Order No. 3/ER/2993/JS-II dated 27.03.2003, of the Election Commission of India are sworn to by the respondent

by describing himself in terms of his description as is presently available in the electoral roll and without disclosing his educational pursuits. While the respondent has, admittedly sworn to the affidavits with his name and description as in the electoral roll, any non-disclosure of the institutions where he studied is no ground to set aside the election. The affidavit required as part of the right to information of the electors also cannot form the foundation to set aside an election under the law as it stands. The said allegations also do not, therefore, constitute a triable case.

A General issue:

34. After a survey of various decisions, the Apex Court laid down in ***V.Narayanaswamy v. C.P. Thirunavukkarasu, (2000) 2 SCC 294,*** that an election petition is based on the rights, which are purely the creature of a statute. It is basic to the law of elections and election petitions that in a democracy, the mandate of the people as expressed at the hustings must prevail and be respected by the courts and that is why the election of a successful candidate is not to be set aside lightly. A heavy onus lies on the

election petitioner seeking setting aside of the election of a successful candidate to make out a clear case for such relief both in the pleadings and at the trial. – (see ***R.P. Moidutty v. P.T. Kunju Mohammad, (2000) 1 SCC 481***).

In the result, it is held that this election petition does not disclose a cause of action, to be proceeded with and tried. It is accordingly rejected.

The substance of this decision shall be communicated to the Election Commission and to the Speaker of the Kerala Legislative Assembly as required by Section 103 of the 1951 Act. An authentic copy of this order shall also be sent to the Election Commission as prescribed.

Sd/-
THOTTATHIL B. RADHAKRISHNAN,
JUDGE.

Sha/